In the High Court of Judicature at Madras

Dated: 15/10/2004

Coram

The Honourable Mr.Justice V.KANAGARAJ

Writ Petition No.15840 of 1997

M/s. Nivaram Pharma Pvt.Ltd.
Rep. by its Director
Sardarmal M.Chordia
Majestic Colony
Valasarawakkam
Madras.87 ... Petitioner

-Vs-

1. The Customs, Excise and Gold
(Control) Appellate Tribunal
South Regional Bench
Madras.

2. The Commissioner of Central
Excise (Appeals)
Nungambakkam High Road
Madras-34

3. The Assistant Commissioenr of
Central Excise
Madras IV Division
Madras. ... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari as stated therein.

For petitioner : Mr.K.Jayachandran

For respondents : Mr.K.Sivakuamr Kennedy
ACGSC

:O R D E R

This writ petition has been filed by the petitioner praying to issue a writ of Certiorari, to call for the records relating to the order passed by the first respondent in Appeal No.E/320/96-Md (Order No.1795/97) dated 09.07.1997 and quash the same and consequently restore the order passed by the second respondent in A.No.178/95-M (Order in Appeal No.233/95-M) dated

16.11.1995.

2. The above petition arises under the Central Excise Act.
The petitioner is the manufactureR of various types of medicines including life saving drugs and the preparations are strictly in accordance with the provisions of Drug Control Act and on the verification of the authorities at all times.
3. Today, learned counsel appearing on behalf of the petitioner would submit that at the time of removal of the goods, two notifications are issued by the Central Government recognizing certain cadre as Small Scale Industry (SSI) benefits; that upto Rs.2/- crores, they need not pay any duty for the total product; that during the relevant period, upto Rs.30/-lakhs, they need not pay any duty concessions as prescribed in the Notification. One of the conditions is that traders should not affix brand name of another person.
4. Learned counsel would further submit that the petitioner is the manufacturer of medicines, from his own raw materials and is also owning a factory, for marketing the products. The petitioner would sell the goods through one marketing concern Viz. M/s.Medo Pharm, Madras who have wide net work in marketing petitioner's P & P Medicines; that the marketing concern's monogram is also affixed in the packing specifically stating "Marketed by" in the carton with their name and address, which is nothing but a 'House Mark'. The notification 1/93-CE dated 01.03.1993 says that benefit would not be available if the manufacturer affixes the brand name of another person on the specified goods. The third respondent passed an order and thereby demanded differential duty from the petitioner on the allegation that the goods cleared by them bear the Brand Name/Trade Name of the marketing concern, without appreciating the difference between "Brand Name/Trade Name" and "House Mark". Against the said order, the second respondent (department) filed an appeal before the first respondent, and the first respondent in turn, without considering the decision of the same Tribunal in similar matter reported in 1996 (86) ELT 124 and without considering the law laid down by the Apex Court on the issue reported in 1 995 (75)ELT 214 allowed the appeal of the department against the petitioner and hence, the petitioner has come forward before this Court with the present writ petition.

5. The Respondents 2 and 3 have filed counter affidavit not only denying the allegations made on the part of the petitioner in his affidavit filed in support of the writ petition but would also submit that the order of the second respondent would not be restored, quashing the order of the first respondent because the second respondent noticed the words "Marketed by" "Medopharm" but failed to notice the word's Monogram and label inscribed besides the above words; that there is no bar to allow the SSI exemption to the petitioner; but, the benefit claimed under notification 1/93 for affixing the brand name of others who are not eligible for exemption is totally against the above statute; that the benefit claimed under notification 1/93 for affixing the brand name of others is totally against the said notification and hence, the duty demanded by the respondents is legally correct; that the order of the second respondent is factually not correct since the second respondent failed to see the words, 'Monogram' or label of 'Medopharm' inscribed besides the word "Marketed by Medopharm"; that duty exemption as per Notification 1/93

is not applicable to the petitioner in view of the fact that the specified goods viz., Fulvin Endomox by petitioner is a brand name of marketing concern viz., M/s Medopharm Ltd; that though the products are manufactured by the manufacturer, the products are influenced on the people's minds in the course of trade through the monogram (brand name) of the marketing concern, that by putting the monogram, brand name of marketing concern has some connection in the course of trade between the specified goods and some person using the brand name of the marketing concern and hence, the petitioner is using the brand name of the marketing concern; further, the petitioner's firm is not allowed to take shelter under the provisions of Drugs and Cosmetics Act and Rules, because the Centaral Excise Act and Rules clearly indicates if any monogram or label is affixed on the product owned by others then the benefit of SSI exemption must be denied and ultimately would pray for dismissal of the above writ petition.

4. Heard both.

5. During arguments, learned counsel for the petitioner and the respondents as afore extracted would only reiterate the factual decision of the case as pleaded in the writ petition and in the counteraffidavit filed, with no law or new fact or circumstance being brought forth, and therefore, it is a case which could be decided based on the materials made available on record and while so looking into those materials in the context of the pleadings of the case, it is an admitted case on the part of the petitioner that two notifications have been issued by the Central Government recognizing certain cadre as Small Scale Industry (SSI); that upto Rs.2/crores they need not pay any duty for the total product; that during the relevant period upto Rs.3 0/lakhs, they need not have to pay any duty as prescribed in the notification; that one of the conditions imposed is that the traders should not affix brand name of another person.

6. On the part of the respondents 2 and 3, it would be argued that the order of the second respondent would not be restored quashing the order of the first respondent because the second respondent only noticed the words "Marketed by" "Medopharm" but failed to notice the word "Monogram" and the label inscribed besides the above works and that there is no bar to allow the SSI exemption to the petitioner; but, the benefit claimed under Notification 1/93 for affixing the brand name of others, they are not eligible for exemption since it is totally above the statute and hence duty demanded by the respondents is legally correct.

7. It would be further argued that the order of the second respondent is not factually correct since the second respondent failed to see the word 'monogaram' and the label of medopharm inscribed besides the words 'Marketed by' 'Medopharm' that the duty exemption as per Notification 1/93 is not applicable to the petitioner in view of the fact that the specified goods, namely, 'Fulvin Endomax' is a brand name of marketing concern namely M/s. Medopharm Limited and the products manufactured have influenced on the people's mind in the course of trade through the brand name 'monogram' of the marketing concern, and since the petitioner is using the brand name of the marketing concern, without permitting the petitioner to take shelter under the

provisions of the Drugs and Cosmetics Acts and Rules and since the Central Excise Act and Rules clearly indicate, that if any monogram or label is affixed on the product owned by others, then the benefit of SSI exemption must be denied and on such grounds would pray to dismiss the above writ petition.

8. In consideration of the facts pleaded, having regard to the materials placed on records and upon hearing learned counsel for both, this Court is able to find that a strong case has been put up on the part of the respondents to the effect that the second respondent has committed factual errors having only noticed the words "Marketed by" and "Medopharm" but failing to notice the word "Monogram" and the label inscribed and therefore, the benefit claimed under Notification 1/9 3 for affixing the brand name of others, is not eligible for exemption since is totally against the statute and would on such strong grounds oppose the claim of the writ petitioner to the prayers above seen.

9. Though the petitioner was successful before the second respondent, since on the part of the respondents, the second respondent has committed error in failing to note the word "Monogram' and the label inscribed besides the words "Marketed by" "Medopharm" and on such factual flaw committed has passed the order in favour of the petitioner which is an error apparent on facts and on such grounds would oppose the claim of the petitioner. Since on account of the factual errors committed on the part of the second respondent which has not been rebutted by the petitioner at all it cannot be argued on the part of the petitioner that the order passed by the first respondent in appeal E/3 20/96-Md.dated 09.07.1997 is either bad or erroneous so as to quash the same as it is claimed on the part of the first respondent consequently restoring the order passed by the second respondent in A.178/95(M) dated 16.11.1995. Furthermore, since on the part of the respondents they have established on facts that the monogram or label is affixed on the product owned by others and therefore, the benefit of SSI exemption has to be denied under Notification 1/93 and since the said Notification is not applicable to the petitioner, they would seek to dismiss the above writ petition in their own right and in the facts and circumstances of the case, this Court is not able to arrive at any different conclusions than what has been advocated and argued on the part of the respondents and hence the following Order.

In result,
(i) the above writ petition does not merit acceptance but is only liable to be dismissed and the same is dismissed accordingly.
No costs.

Index :Yes
Internet :Yes
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